

IN THE UNITED STATES BANKRUPTCY COURT
FOR THE EASTERN DISTRICT OF VIRGINIA
(Richmond Division)

)	
In re:)	Chapter 11
)	
CIRCUIT CITY STORES, INC. <i>et al.</i> ,)	Case No. 08-035653-KRH
)	(Jointly Administered)
Debtors.)	
)	

**MOTION AND SUPPORTING MEMORANDUM OF LAW OF
AMHERST VF LLC (AMHERST, NY); EAST BRUNSWICK VF LLC (EAST
BRUNSWICK, NJ); VORNADO GUN HILL ROAD LLC (BRONX, NY); NORTH
PLAINFIELD VF LLC (NORTH PLAINFIELD, NJ); ALEXANDER'S REGO PARK
CENTER, INC. (REGO PARK, NY); TOWSON VF LLC (TOWSON, MD); GREEN
ACRES MALL, LLC (VALLEY STREAM, NY); WAYNE VF LLC (WAYNE, NJ); VNO
MUNDY STREET LLC (WILKES-BARRE, PA); AND VNO TRU DALE MABRY, LLC
(TAMPA, FL) FOR AN ORDER COMPELLING
DEBTORS TO IMMEDIATELY PAY ADMINISTRATIVE RENT PURSUANT
TO 11 U.S.C. §§ 365(d)(3) AND 503(b) AND GRANTING RELATED RELIEF**

COME NOW Amherst VF LLC (Amherst, NY, Store No. 3152); East Brunswick VF
LLC (East Brunswick, NJ, Store No. 3669); North Plainfield VF LLC (North Plainfield, NJ,
Store #4133); Wayne VF LLC (Wayne, NJ, Store No. 3695); Alexander's Rego Park Center, Inc.

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Counsel for Amherst VF LLC, East Brunswick VF LLC, North Plainfield VF LLC, Wayne VF LLC, Alexander's Rego Park Center, Inc., Towson VF LLC, Green Acres Mall, LLC, VNO Mundy Street, LLC, VNO Tru Dale Mabry, LLC, and Vornado Gun Hill Road, LLC

(Rego Park, NY, Store No. 3686); Towson VF LLC (Towson, MD, Store No. 4134); Green Acres Mall, LLC (Valley Stream, NY, Store No. 3694); VNO Mundy Street, LLC (Wilkes-Barre, PA, Store No. 4106); VNO Tru Dale Mabry, LLC (Tampa, FL, Store No. 857); and Vornado Gun Hill Road, LLC (Bronx, NY, Store No. 3778, and collectively, the “Landlords”), owners and lessors of certain nonresidential real property, to hereby move this Court to enter an order (the “*Motion*”), substantially in the form attached hereto as **EXHIBIT K**: (a) authorizing and directing Debtor, Circuit City Stores, Inc., one of the Debtors in the above-captioned bankruptcy cases (the “Debtors”), to immediately pay outstanding administrative rent for November, 2008 and December, 2008 pursuant to 11 U.S.C. §§ 365(d)(3) and 503(b) of the *United States Bankruptcy Code*, and (b) granting related relief, as more specifically described herein. In support of its *Motion*, the Landlords respectfully state as follows:

Jurisdiction and Venue:

1. This Court has jurisdiction over this motion pursuant to 28 U.S.C. §§ 157 and 1334.

This matter is a core proceeding pursuant to 28 U.S.C. § 157(b)(2).

Basis for Relief:

2. Sections 365(d)(3) and 503(b)(1)(A) authorize the relief requested in this *Motion*.

Background:

3. The Landlords are the lessors and landlords of certain nonresidential real property set forth below:

Owners/Lessors/Landlords	Store/Locations (“Leased Premises”)	Date of Leases ¹
Amherst VF LLC	Amherst, NY (Store No. 3152)	
East Brunswick VF LLC	East Brunswick, NJ (Store No. 3669)	

¹ True copies of the Leases, designated as **EXHIBITS A** through **J** (collectively the “Leases”), respectively, will be made available upon reasonable request to undersigned counsel.

Owners/Lessors/Landlords	Store/Locations (“Leased Premises”)	Date of Leases ¹
Vornado Gun Hill Road LLC	Gun Hill Road, Bronx, NY (Store No. 3778)	
North Plainfield VF LLC	North Plainfield, NJ (Store No. 4133)	
Alexander’s Rego Park Center, Inc.	Rego Park, NY (Store No. 3686)	
Towson VF LLC	Towson, MD (Store No. 4134)	
Green Acres Mall, LLC	Green Acres Mall, Valley Stream (Store No. 3694)	
Wayne VF LLC	Wayne, NJ (Store No. 3695)	
VNO Mundy Street LLC	Wilkes-Barre, PA (Store No. 4106)	
VNO Tru Dale Mabry, LLC	Dale Mabry, Tampa, FL (Store 857)	

4. Pursuant to the Leases, the Debtors were required to pay, in advance on the first day of each month, minimum rent and other charges, including CAM, real estate taxes, and/or insurance.

5. On November 10, 2008 (the “Petition Date”), the Debtors and various of its debtor affiliates filed their respective voluntary petitions for relief under Chapter 11 of the *Bankruptcy Code*.

6. The Debtors currently remain in possession of, and enjoy the use and occupancy of, the Leased Premises.

7. The Debtors have not paid the rent due in November, 2008, for each of the Leased Premises nor paid the portion of the November and December administrative rent and other related charges due and owing under the Leases for the post-petition period commencing upon November 10, 2008, and thru the date hereof, as set forth below (“Administrative Rent”).

Store/Location

Amherst

Administrative Rent Due

\$33,969.95 (prorated at \$25,138.75 from aggregate of November base rent of \$35,912.50, prorated Nov. and Dec. real estate taxes of \$3,591.31, prorated CAM of \$2,932.02, prorated fixed Asset CAM of \$137.59, and prorated Nov. and Dec. land taxes of \$2,170.29).

East Brunswick	\$71,080.92 (prorated at \$47,066.25 from aggregate of November base rent of \$67,237.50, prorated Nov. and Dec. real estate taxes of \$20,212.54, prorated CAM of \$3,773.97, and prorated Water and Sewer of \$28.15).
Gun Hill	\$93,002.79 (prorated at \$45,607.68 from aggregate of November base rent of \$65,153.83, prorated Nov. and Dec. taxes of \$24097.67, prorated CAM of \$5,174.72, and prorated additional taxes of \$18,122.72).
North Plainfield	\$133,039.79 (prorated at \$42,384.57 from aggregate Nov. base rent of \$60,549.38, prorated CAM of \$3,296.58, prorated Nov. and Dec. real estate taxes of \$22,099.86, Dec. base rent of \$60,549.38, and Dec. CAM of \$4,709.40).
Rego Park	\$170,003.38 (prorated at \$151,945.37 from aggregate base rent of \$217, 064.82, and prorated CAM of \$18,058.01).
Towson	\$38,767.39 (prorated at \$32,723.57 from aggregate base rent of \$46,747.96, prorated CAM of \$2,476.38, prorated Nov. and Dec. real estate taxes of \$3,443.63, and prorated insurance of \$123.82).
Green Acres	\$102,169.73 (prorated at \$55,844.00 from aggregate base rent of \$79,777.14, prorated CAM of 2,443.50, prorated Nov. and Dec. real estate taxes at \$58,287.50 from aggregate real estate taxes of \$309,756.88).
Wayne	\$67,221.78 (prorated at \$36,895.83 from aggregate base rent of \$52,708.33, prorated CAM at \$459.78, and prorated Nov. and Dec. real estate taxes of \$29,866.17).
Wilkes-Barre/Mundy St.	\$36,977.91 (prorated at \$29,932.88, from aggregate base of \$42,761.25, prorated CAM at \$2,445.21, prorated Nov. real estate taxes of \$4,499.18, and balance of Dec. real estate taxes of \$100.64).
Tampa/Dale Mabry	\$72,735.90 (prorated at \$52,412.50, from aggregate base of \$74,875.00, prorated sales tax at \$3,668.88, prorated CAM at \$529.23, prorated sales tax at \$37.04, prorated Nov. and Dec. real estate taxes of \$15,035.75 from aggregate 2008 taxes of \$106,134.71, and prorated Nov. and Dec. sales taxes of \$1,052.50 from aggregate tax of \$7,429.43).

Total: \$818,969.54

Relief Requested:

8. The Landlords respectfully move this Court for entry of an order, substantially in the form attached hereto as **EXHIBIT K**: (a) authorizing and directing the Debtors to immediately pay the Administrative Rent owed to the Landlords pursuant to Sections 365(d)(3) and 503(b) of the *Bankruptcy Code*; (b) authorizing and directing the Debtors to reimburse the Landlords for all of their reasonable and actual attorneys' fees and costs incurred in preparing and prosecuting this *Motion* due to the Debtors' failure to comply with the terms of the Leases and Sections 365(d)(3) and 503(b) of the *Bankruptcy Code*; (c) authorizing and directing the Debtors to make all future monthly payments of administrative rent and related charges to the Landlords in full on or before the first day of the month for which such administrative rent and related charges accrue, as required by the Leases; and (d) granting such other and further relief as this Court deems just and proper.

Argument:

9. Section 365(d)(3) of the *Bankruptcy Code* provides, in relevant part, as follows:

The trustee shall *timely perform all the obligations of the debtor*, . . . arising from and after the order for relief under any unexpired lease of nonresidential real property, until such lease is assumed or rejected, notwithstanding section 503(b)(1). . . .

11 U.S.C. § 365(d)(3)(emphasis added).

10. Since the *Bankruptcy Code* compels a landlord to continue post-petition performance, "the provisions of §§ 365(b)(1) and 365(d)(3) unambiguously grant priority status to this class of involuntary claimant." *In re Pudgie's Dev. of NY, Inc.*, 202 B.R. 832, 836 (Bankr. S.D.N.Y. 1996). Such protections are critical to protect landlords from ever-increasing losses during the post-petition, pre-rejection period.

11. This Court and other jurisdictions have repeatedly held that Section 365(d)(3) requires the timely payment of post-petition rent as an administrative expense at the full contract rate. *See In re Trak Auto Corp.*, 277 B.R. 655, 665 (Bankr. E.D. Va. 2002) (until lease rejected, debtor required to pay rent to landlord from the date of petition until date lease rejected), *rev'd on other grounds*, 367 F.3d 237 (4th Cir. 2004); *see also In re Best Products Co., Inc.*, 206 B.R. 404, 406 (Bankr. E.D. Va. 1997) (Congress enacted 365(d)(3) to guarantee landlords would not be placed at disadvantage for providing post-petition services to debtor).

12. In light of the Debtors' failure to pay the Administrative Rent, the Debtors will likely continue to ignore their post-petition obligations under the Leases in violation of the *Bankruptcy Code*. Accordingly, the Court should enter an order directing the Debtors to immediately pay the Administrative Rent and timely pay all future administrative rent and related charges that arise under the Leases on a post-petition basis.

13. Furthermore, the Leases provide that the Debtors are obligated to promptly reimburse the Landlords for all reasonable and actual legal fees incurred in connection with enforcing the Leases after the Debtors default on their obligations thereunder. Accordingly, the Landlords request that the Debtors be directed to pay the attorneys' fees and costs incurred by the Landlords in connection with filing and prosecuting this *Motion*.

Waiver of Memorandum of Law:

14. The Landlords respectfully request that this Court treat this *Motion* as a written memorandum of points and authorities or waive any requirement that this *Motion*

be accompanied by a written memorandum of points and authorities as described in Rule 9013-1(G) of the *Local Rules of the United States Bankruptcy Court for the Eastern District of Virginia*.

No Prior Request:

15. No previous motion for the relief sought herein has been made to this Court or any other Court.

WHEREFORE, by reason of the foregoing and any arguments at hearing, the Landlords respectfully request entry of an order, substantially in the form attached hereto as **EXHIBIT K**: (a) authorizing and directing the Debtors to immediately pay the Administrative Rent owed to the Landlords pursuant to Sections 365(d)(3) and 503(b) of the *Bankruptcy Code*; (b) authorizing and directing the Debtors to reimburse the Landlords for all of their reasonable and actual attorneys' fees and costs incurred in preparing and prosecuting this *Motion* due to the Debtors' failure to comply with the terms of the Leases and Sections 365(d)(3) and 503(b) of the *Bankruptcy Code*; (c) authorizing and directing the Debtors to make all future monthly payments of administrative rent and related charges to the Landlords in full on or before the first day of the month for which such administrative rent and related charges accrue, as required by the Leases; and (d) granting such other and further relief as this Court deems just and proper.

Dated: December 12, 2008

Respectfully Submitted,
AMHERST VF LLC; EAST BRUNSWICK VF LLC;
NORTH PLAINFIELD VF LLC; WAYNE VF LLC;
ALEXANDER'S REGO PARK CENTER, INC.;
TOWSON VF LLC; GREEN ACRES MALL, LLC;
VNO MUNDY STREET, LLC; VNO TRU DALE
MABRY, LLC; AND VORNADO GUN HILL ROAD,
LLC

BY COUNSEL

By: /s/ William A. Gray
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CERTIFICATE OF SERVICE

I hereby certify that on this 12th day of December, 2008, a true and accurate copy of the foregoing was electronically filed with the Clerk of the Court for the Eastern District of Virginia, Richmond Division, using the CM/ECF system, which thereby caused the above to be served electronically on all registered users of the ECF system that have filed notices of appearance in this matter, and was mailed, by U.S. Mail, first class, postage prepaid, to all persons on the attached Service List.

/s/ William A. Gray

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Exhibit K

IN THE UNITED STATES BANKRUPTCY COURT
FOR THE EASTERN DISTRICT OF VIRGINIA
(Richmond Division)

In re:)	
)	Chapter 11
)	
CIRCUIT CITY STORES, INC. <i>et al.</i> ,)	Case No. 08-035653-KRH
)	(Jointly Administered)
Debtors.)	
)	

ORDER

This matter having come before the Court upon the *Motion and Supporting Memorandum of Amherst VF LLC (Amherst, NY); East Brunswick VF LLC (East Brunswick, NJ); Vornado Gun Hill Road LLC (Bronx, NY); North Plainfield VF LLC (North Plainfield, NJ); Alexander's Rego Park Center, Inc. (Rego Park, NY); Towson VF LLC (Towson, MD); Green Acres Mall, LLC (Valley Stream, NY); Wayne VF LLC (Wayne, NJ); VNO Mundy Street LLC (Wilkes-Barre, PA); AND VNO Tru Dale Mabry, LLC (Tampa, FL) for an Order Compelling Debtor to Immediately Pay Administrative Rent Pursuant to 11 U.S.C. §§ 365(d)(3) and 503(b) and Granting Related Relief* (the "*Motion*") filed in the bankruptcy case of the above-captioned Debtors and Debtors in Possession, including specifically, Circuit City Stores, Inc. (the "Debtors"), the Court finds that (i) it has jurisdiction over the matters raised in the *Motion* pursuant to 28 U.S.C. §§ 157 and 1334; (ii) this matter is a core proceeding pursuant to 28 U.S.C. § 157(b)(2); (iii) notice of the *Motion* and the opportunity for a hearing thereon on December 22, 2008, at 1:00 P.M. has been given and no other or further notice is necessary; and (iv) good and sufficient cause exists for the granting of the relief requested in the *Motion* after having given due deliberation upon the *Motion* and the arguments presented at any hearing had thereupon. Therefore,

IT IS HEREBY ORDERED, ADJUDGED, AND DECREED THAT:

1. The *Motion* is **GRANTED**;
2. Unless otherwise defined herein, each capitalized term shall have the meaning ascribed to it in the *Motion*;
3. The Debtors are authorized and directed to pay within two (2) business days of the entry of this Order, the Administrative Rent to the Landlords in the total aggregate amount of **\$818,969.54**;
4. The Debtors shall, within two (2) business days of their receipt of a written request from the Landlords therefore, reimburse the Landlords for all of their reasonable and actual attorneys' fees and costs incurred in preparing and prosecuting the *Motion*;
5. The Debtors shall make all future monthly payments of administrative rent and related charges to the Landlords in full on or before the first day of the month for which such administrative rent and related charges become due under the Leases, and shall pay the real estate taxes, all as required by the Leases;
6. This Court retains jurisdiction to enforce and implement the terms and provisions of this Order and to resolve any and all disputes related thereto; and
7. The Clerk is requested to send copies of this Order, after entry, to all parties and counsel as set forth herein.

ENTERED ON THE DOCKET:

_____/2008

The Honorable Kevin R. Huennekens
United States Bankruptcy Judge
Eastern District of Virginia
Richmond Division

WE ASK FOR THIS:

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PROOF OF SERVICE PURSUANT TO LOCAL RULE 9022-1(C)(2)

I hereby certify that the foregoing proposed Order has been served upon all necessary parties as set forth in the Service List below, electronically through the Electronic Case Filing (“ECF”) System and by United States Mail, first class, postage prepaid on this ____ day of December, 2008.

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